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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: INCRETIN-BASED THERAPIES PRODUCTS LIABILITY LITIGATION **Relates to:** ***Briggs*, Case No. 14cv1677 AJB (MDD) (Doc. No. 28)** ***Kelly*, Case No. 14cv2066 AJB (MDD) (Doc. No. 14)** ***Johnson*, Case No. 14cv2070 AJB (MDD) (Doc. No. 13)** ***Martinez*, Case No. 14cv2071 AJB (MDD) (Doc. No. 13)** ***Kreis*, Case No. 14cv2072 AJB (MDD) (Doc. No. 13)**	**MDL No. 13-md-2452-AJB(MDD)** **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RECONSIDER ORDER DENYING PLAINTIFFS' MOTIONS TO REMAND** Date: January 30, 2015 Time: 2:00 p.m. Courtroom: 3B Judge: Hon. Anthony J. Battaglia Magistrate: Hon. Mitchell D. Dembin

The Court denied Plaintiffs' Motions to Remand on December 23, 2014. In doing so, the Court relied on misstatements and/or misrepresentations made by Defendant Merck. Indeed, the Court's Order incorporates an allegation made, but unsupported by Merck that "Plaintiffs also attempted to file add-on petitions to include *Johnson* and *Kreis* in the JCCP following the initial remand order." This allegation is incorrect, and tellingly, Merck has failed to attach these petitions as exhibits to any filings – because no such petitions exist.

The only petition for coordination filed with the JCCP by any of the Plaintiffs herein was filed in the *Kreis* matter. At that time, there were fewer than 100 plaintiffs with filed cases. Moreover, that petition was mooted by Merck's first notice of removal. The sole petition for coordination concerning these cases filed ***after*** *Kreis*, *Johnson,* and *Kelly* were remanded (and, significantly, after there were more than 100 plaintiffs with claims on file), was filed by Defendant Eli Lilly.

Furthermore, Plaintiffs have never proposed a joint trial. Plaintiffs have never petitioned to coordinate the claims of more than 100 Plaintiffs. Instead, Plaintiffs have merely informed the Court of a practical reality – that, if remanded, these cases will most likely be coordinated in the JCCP proceeding before Judge Highberger, based upon the historically correct fact that Defendant Eli Lilly has sought to coordinate every case that is filed in the State Courts of California. Plaintiffs have not sought that result or taken any action to ensure such a result. Moreover, *Briggs* and *Martinez* have not been the subject of a petition to coordinate by any party, a fact largely overlooked in the Court decision denying remand. With respect to *Martinez* (without which, there would not be more than 100 cases against Merck), there has never been a suggestion, in writing or in court, that it would be coordinated in the JCCP.

The Court relied heavily on the Ninth Circuit's recent decision in *Corber v. Xanodyne Pharmaceuticals,* 771 F.3d 1218 (9th Cir. 2014) (en banc). However, contrary to this Court's opinion, *Corber* does not hold that *any* petition for coordination filed at any time by a plaintiff constitutes a proposal for a joint trial. *Corber* relied upon the well

recognized axiom that the "*plaintiffs are the masters of their complaint,*" and merely holds that the particular language used in the *Corber* petition constituted a proposal for a joint trial. Here, contrary to the fact pattern in *Corber*, Plaintiffs did not file a petition for coordination involving 100 or more plaintiffs. *A fortiori,* Plaintiffs did not say anything in a petition for coordination that could give rise to CAFA mass action jurisdiction.

In light of the above, Plaintiffs respectfully submit that the Court's reliance on Merck's averment that Plaintiffs filed petitions to coordinate after remand is a "mistake" or "clear error" warranting reconsideration. Moreover, there is absolutely no basis for Merck to suggest that Plaintiffs have proposed to coordinate the *Martinez* case in the JCCP, for trial or otherwise. This Court should grant Plaintiffs' remand motions in these cases because Plaintiffs' never proposed a joint trial of more than 100 plaintiffs, explicitly or implicitly, as required to invoke mass action jurisdiction under CAFA.

ARGUMENT

I. STANDARDS OF REVIEW

A. Motion for Reconsideration

This motion is properly before the Court on multiple grounds, including Fed. R. Civ. P. 54(b), Fed. R. Civ. P. 60, CivLR 7.1(i), and this Court's Civil Case Procedures II(G). Under Rule 60, the Court, on a motion and just terms, may relieve a party from an Order, for among other reasons, "mistake, inadvertence, surprise, or excusable neglect," for a "misrepresentation […] by an opposing party," or for "any other reason that justifies relief." Fed. R. Civ. P. 60(b).

The motion also complies with CivLR 7.1(i) and this Court's Civil Case Procedures II(G). "Generally, courts will reconsider a decision if a party can show (1) new facts, (2) new law, or (3) clear error in the court's prior decision." *Labastida* at *2 (citations omitted). "[T]he decision on a motion for reconsideration lies in the Court's sound discretion." *Id*. Plaintiffs ask the Court now exercise its discretion to reconsider and rescind its ruling denying the motions to remand, or, at a minimum, allow full briefing of the issues in the wake of the Ninth Circuit's recent decision in *Corber*.

B. Removal Jurisdiction

The removal statutes are to be strictly construed against removal. Consequently, there is a "strong presumption against removal jurisdiction." *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006). The party seeking removal has the burden of establishing federal jurisdiction. *Holcomb v. Bingham Toyota,* 871 F.2d 109, 110 (9th Cir. 1989). There must be **no doubt** that jurisdiction exists. If doubt exists, remand is required. *Gaus v. Miles, Inc*., 980 F.2d 564, 566 (9th Cir. 1992) ("Federal jurisdiction must be rejected if there is *any doubt* as to the right of removal.") (emphasis added).

II. THE PRESENT ACTIONS ARE NOT SUBJECT TO CAFA JURISDICTION

A. Plaintiffs Did Not Propose a Joint Trial.

In its Response to Plaintiffs' Motions to Remand, Merck asserted three grounds for removal under CAFA: "(1) Plaintiffs' counsel represented to this Court that the cases they file in San Diego County "will be transferred to Judge Highberger and be assigned to him for all purposes," Tr. of Motion Hearing at 5 (Aug. 7, 2014) (attached as Ex. A); (2) Plaintiffs argued that *Briggs* should be remanded because it, like *Johnson*, *Kelly*, and *Kreis*, could be joined with the JCCP, *see* Motion to Remand at 17 n.9 (Aug. 15, 2014) (attached as Ex. E); and (3) Plaintiffs affirmatively filed petitions for coordination in *Johnson* and *Kreis*, *see* Notices to Filing Party (Sept. 2, 2014) (attached as Exs. C & D)." *See* e.g., Doc. 17 at 7 in *Johnson*. The Court's Order Denying Remand found the only disputed issue to be whether Plaintiffs had proposed a joint trial. Order at 9. But it cannot be disputed that Plaintiffs did not propose a joint trial.

In *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009), the defendant removed seven state court actions involving over 600 foreign nationals, on the basis of a claim of diversity jurisdiction and under the "mass action" provisions of CAFA, who claimed that they had been injured by exposure to the chemical DBCP. *Id.* at 945. In each case, there were fewer than 100 plaintiffs named in the complaint. The defendant argued that the seven complaints, taken together, "constituted" a mass action. The court found Dow's arguments unpersuasive and held that CAFA did not apply. *Id.* at 953 ("Congress

appears to have foreseen the situation presented in this case and specifically decided the issue in plaintiffs' favor.").

The *Tanoh* Court recognized that extension of federal jurisdiction over mass actions is strictly circumscribed by the "joint trial" element. *Id.* A proposal for a joint trial is a request that separate suits be converted into *a single trial. Id*. at 945. The statutory key is whether *plaintiffs* have proposed to join the claims of 100 or more persons in a "joint" or "mass" or "single" trial that would address the claims of 100 or more persons. This, and only this, is what CAFA's "mass action" removal provision was designed to address. Moreover, the *Tanoh* Court found Section 4(a)(11), the CAFA provision extending federal removal jurisdiction to "mass actions," to be a narrow exception. "Although CAFA extends federal diversity jurisdiction to both class actions and certain mass actions, *the latter provision is fairly narrow*." *Id*. at 953. CAFA's "mass action" provision applies only to civil actions in which the "monetary relief claims of 100 or more persons are proposed to **be tried jointly**." *Id.* (emphasis added).

In short, the extension of federal jurisdiction over mass actions is strictly circumscribed by the "joint trial" requirement in CAFA. *Id*. Here, Merck's sole support for the proposition that Plaintiffs' proposed a joint trial rests on its mischaracterization of one statement by Plaintiffs' counsel in the *Kelly* and *Martinez* matters at oral argument in federal court on Plaintiffs' Motions to Remand. A complete review of the transcript from that argument, however, reveals that Plaintiffs' counsel never intended to propose that Plaintiffs' claims be tried jointly with the claims of anyone else.[1] In fact, counsel clearly contemplated that the cases would be tried separately, and counsel for Merck clearly

[1] *See* Hearing Transcript dated August 7, 2014, attached hereto as Exhibit A at 5:15-20 ("The real reason behind filing some cases in federal court and some in state court is just the sheer volume of the cases and the ability to get trials for **each** of the plaintiffs within their -- and many of these people have passed away -- the lifespans of their executors or their administrators"); at 6:11-12 ("The plaintiffs feel that **some** of our plaintiffs will get quicker trials before Judge Highberger.") (emphasis added).

understood this as well.[2]

The "for all purposes" language said one time at one hearing by Plaintiffs' counsel is, at best, merely a phrase lifted from California Code of Civil Procedure 404—the provision under which the ***Defendants*** Petition for Coordination was brought. The language does not signal the intent for a joint trial, which is not even authorized under that Section. Rather than consider the phrase "for all purposes" in a vacuum, the Court should review the substance of the Defendant Coordination Documents and Plaintiffs filings, which are replete with discussion of pre-trial benefits, but nowhere mention a joint trial.

Importantly, the fact remains that Plaintiffs never filed a petition for coordination after 100 plus cases were on file, and the statement made by Counsel in two of the cases at oral argument had no effect on the management of the JCCP proceeding. Indeed, Case Management Order ("CMO") No. 1 in JCCP 4574 governs that proceeding. (*See* CMO dated August 30, 2010, attached hereto as Exhibit B). CMO No. 1 provides: "[t]his Order does not constitute a determination that these actions should be consolidated for trial, and does not have the effect of making any person or entity a party to an action in which he, she or it has not been named and served." Because CMO No. 1 in JCCP 4574 does not anticipate coordinating all transferred cases through trial, and the JCCP cases have been limited solely to issues concerning preemption and general causation, CAFA's "mass action" provisions do not, and cannot, apply.

In all events, it would not be possible for all cases currently in the JCCP to be tried jointly. The JCCP was formed in 2009. The JCCP now includes claims against at least

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[2] *Id.* At 9:14-20. ("And I understand Mr. Shkolnik's reference to wanting to have the opportunity to do multiple trials, but in many ways that is the antithesis of the MDL statute. The idea is that you don't want multiple courts to have multiple proceedings at the same time. You want them -- to the extent practicable -- to be coordinated in one court."); at 18:1-7 ("[…] you don't go around and try a thousand, 10,000 cases. You try a few. And then after that happens, the parties have a pretty good idea about what the cases are or are not worth and they proceed from there. […] So the idea that you need to have the ability to try 100-plus case ignores reality on that point, your honor.") (emphasis added).

four defendants regarding several drugs alleging three distinct injuries (pancreatitis, pancreatic cancer, and thyroid cancer). It is clear—at this stage in the JCCP's history –the purpose of the JCCP is to coordinate pretrial proceedings, not to consolidate cases for trial.

B. Bellwether Trials are Not Joint Trials.

The Court suggests that Plaintiffs have proposed a joint trial in the JCCP, as these cases are likely to be resolved by invoking the bellwether process in the JCCP[3]. Even if Bellwether trials are ultimately scheduled in JCCP 4574, Bellwether trials normally do not bind any parties other than the bellwether plaintiffs and defendants. *See Principles of the Law of Aggregate Litigation* §2.02 (comment) (2010) (bellwether trials are "not formally binding on other claimants or respondents"); Eldon Fallon, J. Grabill, & R. Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tulane L. Rev. 2323, 2331 n.27 (2008). They, therefore, cannot be said to "determine" the claims of other plaintiffs. *See* RE00002 ("Plaintiffs . . . have not requested that any bellwether trials that may occur have preclusive effect. . . . [A] bellwether trial, without more, does not trigger the mass action provision of CAFA.").

The touchstone for a joint trial under CAFA, as courts have recognized, is that the trial will have binding or preclusive effect on the claims of one hundred or more plaintiffs. *Bullard v. Burlington N. Santa Fe Ry.*, 535 F.3d 759, 762 (7th Cir. 2008) (exemplary trial, "followed by application of issue or claim preclusion to 134 more plaintiffs without another trial," is joint trial under CAFA); *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011) (bellwether trial where liability is "determined with binding effect" would be joint trial); *see also Tanoh*, 561 F.3d at 954 (mass action provision applies only to "actions in which the trial itself would address the claims of at least one hundred plaintiffs").

[3] This reference to bellwether trials overlooks the fact that cases may be selected from the docket of cases originally filed in the Superior Court in Los Angeles County and have original jurisdiction in that court completely unrelated to the JCCP coordination.

To be sure, non-bellwether plaintiffs (and defendants) could agree to be bound by the determination of issues in a bellwether trial, 1 *Restatement (Second) of Judgments* §40, p. 390 (1980), but no such agreement has been entered here, nor was it proposed—even implicitly. Absent such an agreement, a bellwether trial cannot conclusively determine the claims of non-bellwether plaintiffs. Thus, even if the Court is correct that resolution of these cases would likely involve a bellwether process, it would not constitute a proposal to jointly try the claims of one hundred or more plaintiffs for purposes of federal jurisdiction under CAFA.

C. Plaintiffs Did Not Petition to Coordinate More Than 100 Claims in the JCCP

In denying Plaintiffs' Motions to Remand, the Court erroneously relied on Merck's allegation that, "[s]ubsequent to this Court's order granting their motions to remand, plaintiffs' counsel in *Johnson* and *Kreis* filed a petition for coordination of those cases with the *Byetta* JCCP." This statement is demonstrably false. Plaintiffs did not file such a petition. On August 18, 2014, after *Johnson*, *Kreis, and Kelly* were remanded, Defendant Eli Lilly filed its "Fifty-Seventh Notice and Petition for Coordination of Add-On Cases to Byetta Coordination Proceedings," requesting that the cases be coordinated with JCCP 4574. This was the ***only*** petition for coordination submitted regarding *Kelly* and *Johnson*. ***No*** petition for coordination has ever been submitted regarding *Briggs* or *Martinez*.

The only Petition for Coordination filed by any Plaintiff at issue in this appeal was filed in *Kreis* on May 2, 2014. However, because Merck had already removed *Kreis* on May 1, 2014, the state court rejected Plaintiffs' filing. Notably, at the time of the *Kreis* Petition for Coordination, there were fewer than 100 Plaintiffs with cases on file.

Moreover, even if this Court were to give any weight to Plaintiffs lone filing of a Petition to Coordinate in the *Kreis* case **prior** to 100 cases being on file, Plaintiffs nevertheless expressly rejected joint trials in that filing, a fact clearly overlooked in the Court's remand decision. Indeed, in the Declaration attached to Plaintiffs Coordination Petition, counsel expressly stated, "There will be some common legal issues in the Byetta

cases, although none will predominate over individual issues in these personal injury actions. Such issues may be presented on summary judgment, or otherwise before trial. Petitioners do not seek joint trials of any cases or plaintiffs, but rather, all claims shall be tried individually." Exhibit C.

D. Defendants, Not Plaintiffs, Have Sought Coordination of Plaintiffs' Claims

The Supreme Court's recent decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736 (2014) provides clear guidance for this Court. There, the Supreme Court took special note of 28 U.S.C. §1332(d)(11)(B)(ii)(II), which specifies that "the term 'mass action' shall not include any civil action in which . . . the claims are joined upon motion of a defendant." 134 S.Ct. at 746. By enacting this provision, "Congress demonstrated its focus on the persons who are actually proposing to join together as named plaintiffs in the suit. Requiring district courts to pierce the pleadings…would run afoul of that intent." *Id*.; *see also Teague*, slip op. at 27. Indeed, CAFA itself excludes from its definition of a mass action any case in which the defendant joins the claims of more than 100 plaintiffs (i.e., *Kreis*, *Johnson* and *Kelly*).

As the Court is aware, MDL Defendant, Eli Lilly, filed the original petition for coordination to create a JCCP and, subsequently, the petition to transfer *Johnson*, *Kreis*, and *Kelly* to that JCCP. Merck's notice of removal and subsequent briefing fails to cite a single case in which a court has even considered whether a petition for coordination filed by a defendant constitutes a proposal to be tried jointly under CAFA. This is because CAFA makes clear that any proposal to try claims jointly must come from plaintiffs. *Tanoh v. Dow Chemical Corp.*, 561 F.3d 945, 953-54 (9th Cir. 2009).

In *Corber v. Xanodyne Pharmaceuticals, Inc.* 771 F.3d 1218 (9th Cir. 2014) (en banc), the Ninth Circuit reversed the district court's remand order but explained that "[o]ur conclusions here are consistent with *Tanoh*, where we held that "the decision to try claims jointly and thus qualify as a 'mass action' under CAFA should remain . . . with plaintiffs." 561 F.3d at 954. Unlike the plaintiffs in *Tanoh*, the *Corber* Plaintiffs had voluntarily and affirmatively filed a petition for coordination of more than 100 cases,

which the Court concluded was a proposal to try the cases jointly.

Unlike *Corber* where it was the Plaintiff, here the Defendants have charted the course. Defendant Eli Lilly successfully sought to establish the JCCP, and has, almost without fail, sought to consolidate any newly filed state case into the JCCP. Counsel for *Briggs*, *Kelly*, *Martinez*, and *Johnson* have not sought consolidation of those cases in the JCCP at any time or for any purpose. References made by counsel in these cases to coordination in the JCCP was merely a recognition of the obvious reality that Defendants (not Plaintiffs) have and would transfer all cases remanded to the state court to the JCCP.

Moreover, in *Corber*, the Ninth Circuit explicitly held:

> This is not to say that all petitions for coordination under section 404 are per se proposals to try cases jointly for the purposes of CAFA's mass action provision. We can envision a section 404 petition that expressly seeks to limit its request for coordination to pre-trial matters, and thereby align with the mass action provision's exception for "any civil action in which . . . the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). It is not clear whether the California Judicial Council would grant coordination for less than "all purposes." However, if Plaintiffs had qualified their coordination request by saying that it was intended to be solely for pre-trial purposes, then it would be difficult to suggest that Plaintiffs had proposed a joint trial. But where, as here, plaintiffs petition for coordination by arguing that "hearing all of the actions" together "for all purposes" would promote the ends of justice, they propose a joint trial, triggering federal jurisdiction as a mass action under CAFA.

Importantly, in FN 5 the *Corber* Court also found that, "under the plain language of CAFA, we must determine whether Plaintiffs proposed a joint trial, not whether one will occur at some future date. That a judge has discretion to limit coordination to pre-trial matters does not weigh on whether Plaintiffs proposed a joint trial."

The ultimate holding in Corber is clear, "Asking for coordination or consolidation "for all purposes" or "through trial" to address common issues of law or fact is a proposal to try the cases jointly and creates federal jurisdiction under CAFA's mass action provision." Corber at 1225. Importantly, the Corber court recognized there must be an

affirmative request by Plaintiffs, as masters of their complaints, for coordination or consolidation – here, there are none.

V. CONCLUSION

Plaintiffs have not brought this motion lightly. They are asking the Court to reconsider its ruling because they believe an unintentional but very significant and highly prejudicial error has occurred.

DATED: January 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2015, I caused the above document to be filed via the CM/ECF system for the Southern District of California, and the CM/ECF system served the same upon all registered users at their registered email addresses.

s/Ryan L. Thompson
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